Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996	)	CS Docket No. 96-85

PETITION FOR RECONSIDERATION

THE WIRELESS COMMUNICATIONS
ASSOCIATION INTERNATIONAL, INC.

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TABLE OF CONTENTS

EXECUTIVE SUMMARY

The Wireless Communications Association International, Inc. ("WCA") requests reconsideration of that portion of the Commission's *Report and Order* (the "*R&O*") in which the Commission expands the definition of "bulk discount" to include not only discounts given to landlords, condominium associations and similar entities who procure reception of cable services for all residents of a multiple dwelling unit ("MDU") through a single payment, but also to include discounts that incumbent cable operators offer directly to individual residents of MDUs. The Commission's action is an unauthorized departure from the clear and unequivocal language Congress used in Section 301(b)(2) of the Telecommunications Act of 1996 (the "1996 Act"), and permits incumbent cable operators to charge discriminatory non-uniform rates to individual residents in MDUs, a practice Congress specifically intended to prevent in Section 623(d) of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act").

Section 623(d) initially required that incumbent cable operators maintain geographically uniform rates in areas where they were not subject to effective competition. Thereafter, in Section 301(b)(2) of the 1996 Act, Congress created an exception to Section 623(d) for "*bulk* discounts to multiple dwelling units." Prior to Congress's adoption of Section 301(b)(2), the Commission had recognized that there is a fundamental distinction between a "bulk discount," *i.e.*, a reduced rate offered on a bulk contract basis directly to owners and managers of MDU properties, and a reduced "per unit" rate charged and billed directly to individual subscribers. Congress's *verbatim* incorporation of the term "bulk discount" in Section 301(b)(2) reflects no intent to depart from the historical definition of the phrase. Indeed, Commission statements since passage of the 1996 Act have reaffirmed the historical distinction between "bulk" discounts and per-unit discounts, with no qualification whatsoever from the agency.

Moreover, the Commission now wrongly expands the definition of "MDU" to include single family environments such as trailer parks and, by logical extension, any situation where multiple single-family dwellings can be served without crossing a public right-of-way. As a result, there appears to be nothing that would stop an incumbent cable operator from avoiding the statutory uniform pricing requirement in any townhouse development or other planned community of single-family units that can be served without crossing a public right-of-way. This extends the bulk discount exception far beyond what Congress had intended in the 1996 Act, and WCA thus urges the Commission to bring its interpretation of the exception into line with Congressional intent by declaring that the bulk discount exception applies only to a single sale on a bulk basis to a single building on private property that contains multiple residences.

Finally, WCA notes that Section 76.984(c)(3) of the Commission's Rules states that Section 301(b)(2)'s prohibition on predatory pricing in the MDU environment applies only where the cable operator is not subject to effective competition. The legislative history of the 1996 Act reflects that while Congress may have intended to apply the statutory uniform pricing requirement only to cable systems in noncompetitive markets, it clearly did not intend to permit cable operators to violate the

antitrust laws and engage in predatory pricing simply because they are subject to effective competition. WCA therefore renews its call for the Commission to amend the rule to clarify that the statutory prohibition against predatory pricing applies to cable operators in all markets, as intended by Congress.

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PETITION FOR RECONSIDERATION

The Wireless Communications Association International, Inc. ("WCA"), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby seeks reconsideration in part of the Commission's *Report and Order* (the "*R&O*") in the above-captioned proceeding.[1/]

I. INTRODUCTION.

There is little question that the promotion of full and fair competition between providers of broadband services in multiple dwelling units ("MDUs") is a high priority on the Commission's regulatory agenda. Within the past three years, for example, the Commission has adopted comprehensive rules to provide alternative providers of multichannel video programming ("MVPDs") greater access to cable "home run" wiring within MDUs;[2/] amended its antenna preemption rule (Section 1.4000) to preempt non-federal restrictions on installation, use or maintenance of certain types of fixed wireless antennas used to receive multichannel video services

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[1/] FCC 99-57 (rel. Mar. 29, 1999).

[2/] *Telecommunications Services Inside Wiring - Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 13 FCC Rcd 3659 (1997) (the "*Inside Wiring Order*").

in MDUs;[3] and proposed to adopt new rules that would ensure that broadband providers would enjoy nondiscriminatory access to MDU property where they provide telecommunications services.[4] Through each of these actions, the Commission has charted a clear and direct course toward eliminating long-standing barriers to entry by, among others, alternative MVPDs. In the *R&O*, however, the Commission inexplicably changes course, adopting a series of new rules that not only are inconsistent with the will of Congress, but which will *reduce* competition in the MDU environment.

In Section 623(d) of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), Congress mandated that incumbent cable operators not subject to effective competition offer geographically uniform rates throughout their service areas.[5] In 1993 the Commission created an exception to Section 623(d) for "bulk discounts," provided that such discounts were cost-justified and uniform among buildings of the same size and type within the cable operator's service area. At that time, the Commission used the term "bulk discount" to refer to reduced rates offered when cable service is made available to all residents of an MDU through a bulk sale paid for directly by the owner or manager of the MDU property, and not to discounted rates offered and billed separately to each tenant.

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[3] *Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast; Multichannel Multipoint Distribution and Direct Broadcast Satellite Services*, 13 FCC Rcd 23874 (1998).

[4] *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, FCC 99-141 (rel. July 7, 1999).

[5] 47 U.S.C. § 543(d).

Congress subsequently codified the Commission's bulk discount exception in Section 301(b)(2) of the Telecommunications Act of 1996 (the "1996 Act").[6/] In so doing, Congress clearly and specifically limited the exception to "*bulk* discounts," without changing the historical definition of the term. Although Congress did not vest the Commission with authority to change that definition, in the *R&O* the Commission ignores the words chosen by Congress, declares that "bulk" means "volume," and holds that the bulk discount exception to the statutory uniform pricing requirement applies even where an incumbent cable operator markets its service directly to MDU residents on a unit-by-unit basis and bills them separately. The Commission then compounds its error by declaring that the term "multiple dwelling unit" is not limited to a single building that houses multiple residences, but in fact is broad enough to include quasi-single family environments such as trailer parks or even tracts of townhomes or detached single-family homes located on private property. The Commission's decision must be reversed on reconsideration because the Commission has no statutory authority to permit an exception to the uniform pricing requirement except where a true MDU bulk sale occurs (*i.e.* the owner or manager of a MDU makes a single payment to permit all residents of the MDU to receive service). Finally, WCA requests that the Commission reconsider its failure to amend Section 76.984(c)(2) of its Rules to clarify that, as intended by Congress, the statutory prohibition against predatory discounts applies to all cable operators, regardless of whether they are subject to effective competition.

[6/] 1996 Act, § 301(b)(2), 100 Stat. 115.

II DISCUSSION.

A. The Commission Has No Authority to Expand the Bulk Discount Exception.

It is well settled that where Congress chooses words that speak directly to the precise question at issue, the Commission "must give effect to the unambiguously expressed intent of Congress."[7/] Until adoption of the *R&O*, the Commission had held firm to this canon of statutory interpretation. Indeed, when interpreting statutory language affecting the rights of incumbent cable operators and alternative MVPDs, the Commission has declared itself bound by Congress's words and repeatedly refused to expand their meaning absent an explicit directive from Congress.[8/] The FCC has abandoned that principle here.

Prior to its amendment via Section 301(b)(2) of the 1996 Act, Section 623(d) stated, without exception, that "[a] cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system."[9/] The legislative history of this provision reflects that Congress intended to "prevent cable operators from having different rate structures in different parts of one cable franchise," and to "prevent cable operators from dropping the rates in one portion of a franchise area to undercut a competitor

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[7/] *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842-3 (1983).

[8/] *See, e.g., EchoStar Communications Corporation v. Comcast Corporation, et al.,* 14 FCC Rcd 2089, 2099 (CSB, 1999) (refusing to expand the statutory term "satellite cable programming" to include programming that was "previously" satellite-delivered or programming that is "equivalent" of satellite cable programming); *DirecTV, Inc. v. Comcast SportsNet, et al.*, 13 FCC Rcd 21822, 21834-5 (CSB, 1998) (same).

[9/] 47 U.S.C. § 543(d) (1992).

temporarily."[10/] During the Commission's 1993 rulemaking proceeding in which the agency implemented Section 623(d) and the other rate regulation provisions of the 1992 Cable Act, the Commission concluded that Congress did not intend to preclude cable operators from establishing certain categories of customers, and ruled that "uniform, non-predatory bulk discounts to multiple dwelling units" could form a valid basis for distinctions among subscribers.[11/] The Commission thus excluded bulk discounts in MDUs from the statutory uniform pricing requirement, provided that (1) all MDUs in the franchise area receive the same bulk discount structure; and (2) the operator is able to demonstrate that he/she derives some economic benefit from providing the bulk rate discount.[12/]

The Commission intended that its bulk discount exception apply only where the discount at issue is equally available for bulk sales to all *buildings* of the same size and type; the Commission did *not* extend the exception to situations where the discounted per-unit rates are equally available to individual *subscribers* within the same building. Similarly, in other contexts, the Commission had recognized that "there is a fundamental difference between the nature of bulk rate accounts and individual residential accounts,"[13/] and accordingly used the term "bulk discount" when referring to reduced rates offered on a bulk contract basis directly to owners and managers of MDU properties,

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[10/] S. Rep. 102-92, 102d Cong., 1st Sess., at 76 (1991).

[11/] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 5631, 5897 (1993) (the "*1993 Rate Order*").

[12/] *Id.* at 5898.

[13/] *Social Contract for Continental Cablevision*, 11 FCC Rcd 299, 327 (1995).

and not to any reduced "per unit" rates charged to individual subscribers.[14/] Indeed, the Commission has underscored the limited nature of the exception by warning that bulk discounts should not be abused to displace other multichannel video providers from MDUs,[15/] and by noting that Congress did not intend to permit cable operators to cross-subsidize artificially low bulk sale MDU rates with revenue from individual residential subscribers.[16/]

In Section 301(b)(2) of the 1996 Act, Congress codified the Commission's then-existing bulk discount exception and applied it to "*bulk*" discounts, not "volume" discounts. The term "bulk" is not specifically defined in Section 301(b)(2) of the 1996 Act or anywhere else in the Communications Act of 1934, as amended. Congress's silence thus compels the Commission to

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[14/] *See, e.g., Falcon Cable Systems*, 13 FCC Rcd 4425, 4439 (CSB, 1998) ("Because Falcon has an actual count of its total subscribers, *bulk and residential*, it fails to meet the threshold requirement and is precluded from using the [equivalent billing unit] methodology.") (emphasis added); *SBC Media Ventures, Inc.*, 9 FCC Rcd 7175, 7181 n. 46 (CSB, 1994) ("Bulk basic rates are discounted service rates offered to multiple dwelling units, such as apartment buildings and condominiums."); *Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation.* 8 FCC Rcd 5631, 5898 (1993). Commission filings by the cable MSOs reflect that they, too, understood the fundamental distinction between bulk discounts and discounted rates offered to individual residential accounts. *See, e.g.,* Comments of Tele-Communications, Inc., MM Docket No. 92-266, at 61-62 (filed Jan. 27, 1992) ("[C]able operators should be allowed to maintain *bona fide* service categories. [T]he different cost structures of different categories of customers justify such a rate structure. This is particularly true of multiple subscriber agreements, including . . . long term contracts to serve a multiple dwelling unit . . . . Cable operators negotiate these service contracts with commercial businesses, MDU management companies and developers. *By their very nature, these commercial situations differ from the cable operator's relationship with individual subscribers.*") (emphasis added); Comments of Cablevision Industries Corp., MM Docket No. 92-266, at 88 (filed Jan. 27, 1993); Comments of Comcast Cable, MM Docket No. 92-266, at 64 (filed Jan. 27, 1993); Comments of Cox Cable Communications, MM Docket No. 92-266, at 84-85 (filed Jan. 27, 1993).

[15/] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 4316, 4326 (1994).

[16/] *Id.* at n. 14.

"start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used."[17/] Black's Law Dictionary defines a "bulk sale" as "[a] sale of substantially all the inventory of a trade or business *to one person in one transaction.*"[18/] Nothing in Section 301(b)(2) of the 1996 Act or the legislative history thereof suggests that Congress intended to change the meaning of "bulk," nor is there anything in the statute which suggests that Congress gave the Commission any authority to do so. Had Congress intended to expand the scope of the exception in the manner suggested by the *R&O*, it presumably would have either deleted the statute's reference to bulk discounts or explicitly redefined the term "bulk discount" as the Commission has done in the *R&O*.[19/]

Any doubts as to the meaning of "bulk" are put to rest by the fact that the Commission has continued to recognize the distinction between discounts associated with bulk sales and discounted per-unit rates *even after adoption and release of the R&O*. For example, in a decision released approximately six weeks after the issuance of the *R&O*, the Commission described the methodology for calculating a cable system's annual regulatory fees as follows:

> Cable system operators are to compute their subscribers as follows: Number of single family dwellings + number of individual households in multiple dwelling unit

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[17/] *Russello v. United States*, 464 U.S. 16, 21 (1983), *quoting Richards v. United States*, 369 U.S. 1, 9 (1962).

[18/] *Black's Law Dictionary* 102 (6th ed. 1990)(emphasis added).

[19/] *Cf. Telephone Company-Cable Television Cross Ownership Rules*, 10 FCC Rcd 244, 276 (1994) ("[W]e addressed and rejected assertions that Congress intended to codify the interpretive notes to Section 63.54 of our rules. . . In support of this assertion, we noted that Congress changed the language of our cross-ownership rules, specifically codifying some aspects of these rules, while overruling others. We also noted that Congress could have explicitly codified Notes 1 and 2 had it intended to, but did not.").

> (apartments, condominiums, mobile home parks, etc.) paying at the basic subscriber rate + bulk rate customers + courtesy and free service. Note: Bulk-Rate Customers = Total annual bulk-rate charge divided by basic annual subscription rate for individual households.[20/]

In other words, the *R&O* notwithstanding, the Commission still recognizes that bulk rate customers are entirely separate and distinct from "individual households" in a multiple dwelling unit, and that a landlord who pays a "bulk rate" on behalf of his or her tenants is entirely separate and distinct from a tenant who purchases service individually and pays the basic subscriber rate.[21/]

Moreover, the Commission has drifted even further away from Congressional intent by adopting an extremely expansive definition of "multiple dwelling unit" for purposes of the bulk discount exception. As was recognized in the *Order and Notice of Proposed Rulemaking* in this proceeding, both Congress and the Commission historically have defined a "multiple dwelling unit"

[20/] *Assessment and Collection of Regulatory Fees for Fiscal Year 1999*, MD Docket No. 98-200, FCC 99-146, at n. 48 (rel. June 18, 1999). *See also 1998 Biennial Regulatory Review - - "Annual Report of Cable Television Systems," Form 325, Filed Pursuant to Section 76.403 of the Commission's Rules*, CS Docket No. 98-61, FCC 99-13, at Appendix A (rel. Mar. 31, 1999) (same).

[21/] The *R&O* offers two rationales for its sudden departure from the definition of "bulk," neither of which are persuasive. First, the Commission states that it "share[s] Cablevision [System Development's] concern that mandating negotiations [with the MDU owner] would make the MDU owner or manager the gatekeeper to competition . . . ." *R&O* at ¶ 100. Less than two years earlier, however, when Cablevision and other cable MSOs made this very same "landlord as gatekeeper" argument, the Commission explicitly rejected it. *Inside Wiring Order*, 13 FCC Rcd at 3690-91 (emphasis added). *See also New York State Elec. & Gas v. Secretary of Labor*, 88 F.3d 98, 107 (2nd Cir. 1996), *citing Atchison, Topeka & Santa Fe Ry. v. Wichita Bd. Of Trade*, 412 U.S. 800, 808 (1973) ("When an administrative agency addresses a question in an inconsistent manner, departing from a position it has taken, it must make a clear statement of its new rule and articulate its reasons for making the change . . . ."). Second, the Commission attaches significance to the cable MSOs' claim that they "have a variety of billing arrangements with owners and residents of MDUs." *R&O* at ¶ 99. The fact that incumbent cable operators may sell their services in MDUs through the property owner or to individual tenants directly has no bearing on the meaning of "bulk" in Section 301(b)(2), nor does it give the Commission any authority to depart from the language Congress chose to use in the statute.

as being a single building that contains multiple residences.[22] In its *1993 Rate Order*, the Commission speculated that "bulk discounts to multiple dwelling units, including apartment buildings, hotels, condominium associations, hospitals, universities, and trailer parks, *could* form a valid basis for distinctions among subscribers . . . ."[23] Seizing on the fact that Section 301(b)(2) of the 1996 Act does not explicitly address this statement, the Commission has now transformed its speculation into law and declared that trailer parks and similar types of quasi-single family environments are MDUs for purposes of the statutory bulk discount exception.[24]

Viewed in tandem with the Commission's redefinition of "bulk discount," the Commission's expansion of the term "MDU" to include trailer parks and similar environments patently violates this principle. Since as a practical matter there is little that distinguishes a trailer park from any other piece of private property that houses single-family units, the Commission's expanded definition of "MDU" presumably would also include any townhouse development or other planned community of single-family units that can be served without crossing a public right-of-way. In fact, taking the

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[22] *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 5937, 5971 (1996). *See also Massachusetts Community Antenna Television Commission*, 2 FCC Rcd 7321, 7322 (1987); *Amendment of Part 76 of the Commission's Rules and Regulations with Respect to the Definition of a Cable Television System and the Creation of Classes of Cable Systems*, 63 FCC 2d 956, 996-97 (1977).

[23] *R&O* at ¶ 105, *quoting 1993 Rate Order,* 8 FCC Rcd at 5897.

[24] *Id.* There is nothing in the 1996 Act or its legislative history which suggests that Congress intended to deviate from the historically narrow definition of "multiple dwelling unit" in favor of the dramatically liberalized definition proffered in the *1993 Rate Order*. Indeed, the fact that the 1996 Act modified the statutory "private cable" exemption to eliminate any reference to MDUs demonstrates that Congress is fully capable of distinguishing between MDUs and other types of multiresidential properties where private cable service is provided. *See* 1996 Act, § 301(a)(2), 110 Stat. 115. Just as Congress expanded the "private cable" exemption beyond MDUs, Congress could have just as easily expanded the "bulk discount" exception to include non-MDU properties.

Commission's reasoning to its logical extreme, volume discounts can now be offered to a city block of single-family homes, so long as they can be served without crossing a public right of way. Obviously, this would eviscerate the statutory uniform rate requirement in many single-family residential areas, and thus would extend the statutory bulk discount exception well beyond what Congress had intended.[25/]

B. *The Commission Should Revise 76.984 (c)(3)of its Rules to Clarify That The Statutory Prohibition on Predatory Pricing in MDUs Applies Regardless of Whether An Incumbent Cable Operator Is Subject to Effective Competition.*

As currently written, Section 76.984(c)(3) of the Commission's Rules states that the statutory bulk discount exception does not apply to "[b]ulk discounts to multiple dwelling units . . ., except that *a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit.*"[26/] As noted in WCA's initial comments in this proceeding, WCA is concerned that the italicized language could be misconstrued to permit a cable operator to engage in predatory pricing if it is subject to effective competition, or if it is serving non-MDUs.[27/]

[25/] *See MCI Telecommunications v. American Tel. & Tel.*, 521 U.S. 218, 231 (1994) (agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear).

[26/] 47 C.F.R. § 76.984(c)(3) (emphasis added).

[27/] Comments of The Wireless Cable Association International, Inc., CS Docket No. 96-85, at 4-5 (filed June 4, 1996).

Such a result would clearly be inconsistent with both the text and the legislative history of the 1996 Act. Section 601(b) of the Act generally provides that, save for certain specific provisions, nothing in the 1996 Act is intended to "modify, impair, or supersede the applicability of the antitrust laws."[28/] In the legislative history of the Act, Congress recognized that Section 301(b)(2) is not intended to permit predatory pricing in violation of antitrust laws of general applicability. For example, on the Senate floor Senator Slade Gorton (a member of the House/Senate Conference Committee) stated that:

> I would like to clarify, and express my understanding, of a somewhat confusing provision in the bill regarding uniform pricing of cable rates. The conference report changes the uniform rate requirement in two essential ways. First, section 301(b)(2) of the legislation sunsets the uniform rate structure requirement in markets where the cable operator faces effective competition.
>
> The second change to the uniform rate requirement is the addition of language that permits cable operators to offer bulk discounts to multiple dwelling units for MDU's. The language in this section permits cable operators to offer bulk discounts to MDU's "except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit."
>
> I understand that there has been concern that this somewhat awkwardly worded section implicitly condones predatory pricing once there is competition in a market, or for subscribers who do not live in MDU's. *Clearly it is not the intent of Congress to supersede the Sherman Act by allowing cable operators to engage in predatory pricing at any time or any circumstances.* In fact, the legislation includes a general antitrust savings clause in section 601(b). This clause guarantees that antitrust concerns still will be addressed in the telecommunications industry.[29/]

[28/] 1996 Act, § 601(b). *See also R&O* at ¶ 106 ("[C]ongress prohibited cable operators offering bulk discounts from charging predatory prices in MDUs. . . We believe that, by addressing predatory pricing in the context of the bulk discount exception to the uniform pricing requirement, Congress intended to make available a timely cost effective review of predatory pricing complaints separate from the antitrust review available under federal or state antitrust laws or other state consumer laws.").

[29/] 142 Cong. Rec. 5720 (daily ed. Feb. 1, 1996) (statement of Sen. Gorton) (emphasis added).

Others also emphasized the importance of the antitrust savings clause in Section 601(b).[30/]

Perhaps by virtue of an oversight, the Commission does not address this issue in the *R&O*.[31/] Accordingly, to avoid any confusion and ensure that the rule accurately reflects Congressional intent, WCA suggests that Section 76.984(c)(3) be revised to read as follows:

> (3) . . . Bulk discounts to multiple dwelling unit shall not be subject to this subsection, except that a cable operator of a cable system ~~that is not subject to effective competition~~ may not charge predatory prices ~~to a multiple dwelling unit~~.

II CONCLUSION.

Given that most consumers still do not enjoy access to alternative MVPDs in the MDU environment, now clearly is not the time for the Commission to retrench from its pro-competitive policies in this arena. WCA submits that reconsideration of the *R&O* as requested above is necessary

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[30/] *Id.*, at S687 (statement of Sen. Pressler) and at S711 (statement of Sen. Thurmond).

[31/] *See R&O* at ¶¶ 106-113.

to restore those policies in full and ensure that alternative MVPDs do not continue to be burdened by artificial barriers to entry that only serve to strengthen the cable MSOs' dominance in the marketplace. WCA thus urges the Commission to grant this Petition as specified herein.

Respectfully submitted,

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